STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DEANGELO VEHICLE SALES, LLC,

Plaintiff,

v.

Index No. 813400/2018

ADRIAN LEWIS PETERSON,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

BOND, SCHOENECK & KING, PLLC
Scott M. Philbin, Esq., of Counsel
Office and P.O. Address
Avant Building – Suite 900
200 Delaware Avenue
Buffalo, New York 14202-2107
Telephone: (716) 416-7000

1338706.1

INTRODUCTION

Plaintiff Deangelo Vehicle Sales ("DVS") brings the instant motion for summary judgment seeking judgment against Defendant Adrian Lewis Peterson ("Peterson") in the amount of $7,488,976.99 as of July 25, 2019 together with default interest in the amount of $2,311.11 per day through date of judgment. Plaintiff's motion for summary judgment rests solely on the affidavit of a non-party who alleges that Peterson executed a promissory note with the principal amount of $5,200,000 and failed to make any payment on said note.

In his Answer to the Complaint seeking to enforce the note, Peterson asserted various affirmative defenses including but not limited to the Fifth Affirmative defense stating that the claims are barred by the doctrines of waiver, consent, justification, ratification and estoppel. Limited paper discovery has been exchanged in this matter and DVS now moves for summary judgment before discovery has been completed relying exclusively on the terms of the note and a non-party affidavit alleging default.

As more fully set forth below, there are essential facts relating to Peterson's affirmative defenses that rest solely with DVS. As such, the plaintiff's motion for summary judgment should be denied pursuant to CPLR Rule 3212(f), or in the alternative, the Court should issue an order staying the motion for summary judgment to allow for the completion of discovery.

ARGUMENT

POINT I

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED PURSUANT TO CPLR RULE 3212(f)

CPLR Rule 3212(f) states:

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

CPLR Rule 3212(f) *McKinney's* 2005.

Where opposition to a motion for summary judgment demonstrates that facts essential to justify opposition to the motion Courts are well within their discretion to hold the motion for summary judgment in abeyance pending completion of discovery. *See e.g. Murray v. ANB Corp.*, 74 A.D.3d 1548, 1549 (3d Dept. 2010)(holding motion for summary judgment in abeyance where defendant moved for summary judgment after issue was joined but before discovery was completed); *see also HSBC Bank USA, N.A. v. Arias*, 112 A.D.3d 785, 786 (2d Dept. 2013)(denying motion for summary judgment as premature, without prejudice to renew).

Where facts essential to justify opposition to a motion to summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 102 (1st Dep't 2006). This is particularly so in cases where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *Id.*

Here, the information need to oppose DVS' motion for summary judgment rests solely in the possession of DVS. Specifically, Peterson has alleged as an affirmative defense that plaintiff's claims are barred by the doctrine of waiver, consent, justification, ratification and estoppel. (See Peterson Answer attached to Reina affirmation as Exhibit "B"). As more fully set forth in the accompanying affidavit of Dennis T. Chu, a 1099-C cancellation of debt was filed for Peterson in 2017 from an entity that appears to have been DVS. The 1099-C cancelled $2,000,000.00 in debt. All information relating to the filing of the 1099-C debt cancellation rests solely in the control of DVS. Peterson should be afforded the opportunity to conduct discovery to identify when the 1099-C debt cancellation was filed with the IRS as the date of filing relates to interest calculation on the loan. Furthermore, Peterson should be allowed to depose a representative of DVS concerning the filing of the 1099-C debt cancellation to determine why it was filed, and to confirm that it discharged a significant portion of the $5.2 million loan at issue. Peterson should also be afforded the opportunity to examine DVS' tax returns for the year 2017 to confirm that DVS wrote off a portion of the loan at issue as being uncollectable. All of this information is relevant to Peterson's affirmative defense that DVS's claims are barred by the doctrines of waiver, consent, justification, ratification and estoppel, because DVS may have taken actions before commencing suit which resulted in a waiver and/or limitation of its ability to collect on the full amount of the note at issue.

Similarly, Peterson should also be allowed to conduct discovery relating to the pending litigation venued in Pennsylvania involving DVS' pursuit of an insurance claim against a LOV Policy naming Peterson as an insured. Specifically, Peterson should be

afforded the opportunity to obtain all documents, pleadings, and testimony in the Pennsylvania Action because any money recovered in that action will serve as an offset to the total amount recoverable from the note at issue. Simply stated, in the event DVS recovers any money from Peterson's LOV policy in the Pennsylvania action, it should be estopped from pursuing the full amount of the note at issue in this litigation by the amount recovered in the Pennsylvania action. All information relevant to this defense lies exclusively under the control of DVS, and as such, plaintiff's motion for summary judgment should be denied.

POINT II

PLAINTIFF'S MOTION FAILS TO ESTABLISH IT'S CLAIM FOR ATTORNEY'S FEES

While the right to recover attorney's fees under a promissory note is well established, such provisions are strictly construed to permit the recovery of attorney's fees only insofar as such fees are related to the enforcement of the relevant note. *Tregerman v.* Auerbach, 2015 N.Y. Misc. Lexis 250 (N.Y. County 2015); *citing Tudisco v. Duerr*, 89 A.D.3d 1372, 1376, 933 N.Y.S.2d 140 (4th Dept. 2011)(awarding attorney's fees related to defendants claims and counterclaims to enforce their rights under the note but denying recovery for attorney's fees related to causes of action for conversion of construction equipment where such claims were unrelated to the enforcement of the note); *Gizzi v. Hall*, 309 A.D.2d 1140, 767 N.Y.S.2d 469 (3d Dept. 2003)(holding that defendants were entitled to counsel fees related to their counterclaims to enforce their rights under the note, but not for any fees related to

plaintiffs' claims, as those fees are related to defending defendants' actions in procuring the note and mortgage, not enforcing rights thereunder).

Indeed, the note at issue also contains a similar restriction on attorney's fees stating:

> Borrower shall be liable to pay all reasonable and necessary Collection Costs, including, without limitation, those relating to reasonable attorney's fees incurred by Lender due to Borrower's failure to make Payment as described herein and/or Lender's enforcement of this Note, whether by court action or otherwise.

(See note at Section 18 attached to McKenzie affidavit as Exhibit A). [emphasis added]

As such, plaintiff bears the burden of demonstrating to this Court that that the attorney's fees being sought in the motion at bar: 1) were incurred by the Lender (DVS); 2) relate to the enforcement of the note at issue; and 3) are reasonable.

As more fully set forth in the accompanying affirmation of Scott M. Philbin, the invoices submitted by DVS' former counsel, Heitner Legal and the Law Offices of Stephen Ghee, do not support DVS' claim for attorney's fees because there is no proof these invoices were submitted to DVS for payment. The only invoices submitted for payment to DVS are the invoices from McNees Wallace & Nurrick, LLC. However, the McNees firm was never counsel of record in this matter and their invoices are little more than block monthly bills lacking sufficient details to determine whether the time was reasonable and related to the enforcement of the note. Notably, the McNees invoices do not even identify the profession who rendered the work; the hourly rate being charged; or the number of hours worked. Similarly, plaintiff's request for $9,000 in attorney's fees for the motion at bar is not supported by an affidavit attesting to the hours incurred and the reasonableness of the charges.

For all of these reasons, plaintiff's claim for attorney's fees should be denied because it has failed to demonstrate that the invoices are reasonable and relate to DVS' enforcement of the note at issue.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that this Court should enter an order denying plaintiff's motion for summary judgment in its entirety, or in the alternative, denying the motion for summary judgment without prejudice to allow Peterson additional discovery, together with such other and further relief as the Court deems just and proper.

Dated: August 14, 2019

BOND, SCHOENECK & KING, PLLC

By: _____
Scott M. Philbin, Esq.
Avant Building – Suite 900
200 Delaware Avenue
Buffalo, New York 14202
Tele: 416-7000

Attorneys for Defendant

TO: Jeffrey F. Reina, Esq.
LIPSITZ, GREEN, SCIME, CAMBRIA, LLP
42 Delaware Avenue, Suite 120
Buffalo, New York 14202
Tele: 849-1333

Attorneys for Plaintiff